

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

GLASS CITY MOVERS, LLC,

Respondent.

**Docket No. FMCSA-2008-0250¹
(Midwestern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

On June 3, 2008, the Field Administrator for the Midwestern Service Center, Federal Motor Carrier Safety Administration (FMCSA) (Claimant) served a Notice of Claim (NOC) on Glass City Movers, LLC (Respondent).² The NOC, based on a May 21, 2008 compliance survey, charged Respondent with one violation of 49 CFR 387.7(a), operating without the minimum level of financial responsibility coverage in effect, with a proposed civil penalty of \$800; and one violation of 49 CFR 392.9a(a)(1)/14901(d)(3), operating without the required household goods operating authority, with a proposed civil penalty of \$25,000.

After Respondent failed to respond to the NOC, Claimant served a Notice of Default and Final Agency Order (NDFAO) on July 18, 2008.³ The NDFAO advised

¹ The prior case number was OH-2008-0138-US1211.

² Exhibit B to Field Administrator's Motion to Deny the Petition for Reconsideration (hereafter Claimant's Motion).

³ Exhibit C to Claimant's Motion.

Respondent that the NOC would become the Final Agency Order in this proceeding effective July 23, 2008, with the \$25,800 civil penalty immediately due and payable on that date.

On August 6, 2008, Respondent served a Petition for Reconsideration.⁴

Respondent stated that it had assumed the NOC was issued by mistake or clerical error and made several calls to FMCSA between July 13 and July 26, 2008 in an attempt to resolve this mistake.⁵ Respondent claimed it “was under the mistaken impression” that it was in compliance with the regulations in question until advised otherwise on June 3, 2008. This impression was based on an August 9, 2005 letter from FMCSA stating that Respondent’s application for operating authority had been approved and the absence of any subsequent notice that its operating authority had been suspended or revoked. Respondent stated that it now has the required insurance coverage and will not operate across state lines “until registration is approved for operating authority.”

Respondent further claimed it did not understand the legal ramifications of not responding to the NOC within the regulatory deadline until retaining legal counsel on August 4, 2008. It contended that imposition of the proposed civil penalty would have a dramatic impact on its ability to remain in business and requested that the Final Agency Order be vacated because Respondent demonstrated excusable neglect, due diligence in seeking relief and meritorious defenses to the allegations in the NOC. It also requested

⁴ Exhibit D to Claimant’s Motion.

⁵ There is no indication that Respondent actually discussed the merits of the NOC with any FMCSA employees.

that the entire action be stayed until an informal hearing can be scheduled to discuss the facts of this case.⁶

In his Motion to Deny the Petition served September 5, 2008, Claimant contended that the Petition should be denied because Respondent failed to timely respond to the NOC and did not present sufficient grounds for vacating the Final Agency Order.

2. Decision

It is undisputed that Respondent did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a).⁷ Therefore, it defaulted. Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent has not met its burden of demonstrating that the Final Agency Order should be vacated. Respondent's explanation for failing to respond to the NOC—that it mistakenly believed the NOC was issued in error and the matter could be resolved over the telephone—does not establish excusable neglect. Respondent apparently did not take the trouble to read the entire NOC. Pages 4 and 5 of that document clearly state that Respondent must serve a written response to the NOC within 30 days and that failure to serve a timely reply may result in the issuance of a notice of default and final agency order declaring the NOC, including the civil penalty proposed therein, to be the final

⁶ Respondent's request for a stay was unnecessary because, under 49 CFR 386.64(a), the timely filing of the Petition for Reconsideration automatically stayed the action.

⁷ The NOC reply deadline was July 8, 2008. This date was calculated by adding 30 days to the June 3, 2008 service date of the NOC and an additional five days because the NOC was served by mail. *See* 49 CFR 386.8(c)(3).

agency order in the proceeding.⁸ Respondent's failure to heed this unambiguous warning, regardless of whether or not it believed it was in compliance, is not excusable neglect.

Respondent's alleged inability to timely engage appropriate legal counsel also does not constitute excusable neglect in failing to respond to the NOC. The July 30, 2008 letter from Michael P. Dansack, Jr., Esq., to John Pastrokos (Respondent's Owner), which was attached to the Petition, indicates that Respondent did not attempt to seek legal counsel until well after the reply deadline expired and the NDFAO was issued.

The evidence submitted by Claimant in support of his Motion established that Respondent did not have a meritorious defense to either of the charges in the NOC. FMCSA's licensing database shows that Respondent's application for household goods operating authority was dismissed on September 15, 2005 and that Respondent had no operating authority as of May 27, 2008.⁹ Respondent's claim that it mistakenly believed that it had the necessary operating authority and did not intend to operate unlawfully is not relevant to the issue of whether a violation occurred.¹⁰ Moreover, Respondent's allegation that it had no notice that it lacked the necessary operating authority is

⁸ The importance of a written response is emphasized by the use of upper case letters providing notice of this requirement on page 5 of the NOC.

⁹ See Exhibits E-1 and E-6 to Claimant's Motion.

¹⁰ See *In the Matter of Tractores Y Camiones de Nogales, S.A. de C.V.*, Docket No. FMCSA-2006-26466, Order Denying Petition for Reconsideration, December 11, 2008.

contradicted by three letters from FMCSA advising Respondent that its failure to submit to a new entrant safety audit would result in the revocation of its operating authority.¹¹

With respect to the § 387.7(a) charge, Respondent did not claim to have the necessary insurance coverage in effect at the time of the violation, but stated that it obtained new insurance following receipt of the NOC and is now in compliance with the financial responsibility requirements. However, post-violation corrective action in response to an NOC is an admission that the violation occurred, not a defense to the violation.¹² Consequently, Respondent did not present any meritorious defenses. Moreover, Respondent's serving of a Petition for Reconsideration approximately three weeks after service of the NDFAO did not constitute due diligence in seeking relief.

Therefore, the default stands and the Notice of Claim, including the proposed civil penalty assessment, is final. The essence of a default is a failure on the part of the motor carrier or driver to participate in the proceedings when required to do so.¹³ Having failed to participate in these proceedings within the time limit set by law, it is too late for Respondent to now be heard.¹⁴

¹¹ See Exhibits E-3 through E-5 to Claimant's Motion. Curiously, the third letter, dated October 31, 2005, was sent six weeks after Respondent's application for operating authority was dismissed by FMCSA's Licensing Division.

¹² See *In the Matter of Titan Moving and Storage, Inc., dba Deathwish Piano Movers*, Docket No. FMCSA-2008-0387, Order Denying Petition for Reconsideration, January 7, 2010.

¹³ See *In the Matter of Parcel Shipper's Express, Inc.*, Docket No. FMCSA-2000-9523, Order, May 25, 2001, at 3.

¹⁴ *In the Matter of Kent Ness dba Ness Harvesting*, Docket Nos. FMCSA-2000-8111 and FMCSA-2002-11610, Order Denying Petitions for Reconsideration, March 15, 2002.

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding.¹⁵

It Is So Ordered.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

5.19.10
Date

¹⁵ The July 18, 2008 NDFAO stated that the \$25,800 civil penalty was due and payable on July 23, 2008, the date that the NOC would become the Final Agency Order. Because Respondent petitioned for reconsideration on August 6, 2008, the clock on the effective date of the Final Agency Order was not stayed by the petition. Therefore, the civil penalty is due and payable immediately. Respondent should consult the NDFAO for payment instructions.

CERTIFICATE OF SERVICE

This is to certify that on this 21 day of May, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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